UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

GRANT HOUWMAN, Plaintiff, v. JON GAISER, Defendant.	Civ. 10-4125 MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Plaintiff, Grant Houwman, submits this memorandum in opposition to the Defendant's Motion for Summary Judgment.

Introduction

Jon Gaiser partook in a torrid, months-long affair with his workplace subordinate, Brittney Houwman. The affair caused Brittney to become emotionally unstable, anxiety-ridden, and depressed. She withdrew from her husband and her children. Eventually the Houwmans divorced. The divorce court found the affair with Jon to be the cause of the divorce. Grant now sues Jon for alienating the affections of Brittney.

Jon's motion for summary judgment should be denied because all elements of the claim are satisfied. Jon fantasized about Brittney from the time he hired her. He then used his supervisory role to orchestrate the relationship. Jon knew Brittney did not want to have an affair, but he preyed upon Brittney's fragile state of mind and pursued her anyways. Jon's fantasies came true, and he caused Brittney to fall in love with him, and out of love with her husband.

Standard of Review

The rules governing this Court's consideration of a motion for summary judgment are well settled. The movant is entitled to summary judgment only when it has been demonstrated that no genuine issue of material fact exists. *Chien ex rel. Chien v. City of Sioux Falls*, 393 F. Supp. 2d 916, 919 (D.S.D. 2005). The evidence must be viewed most favorably to Grant's claims and all reasonable doubts and inferences should be resolved in favor of the Grant, and against Jon. *Id.* The burden is entirely upon Jon to prove the absence of genuine issues of material fact, and that summary judgment is appropriate. *Id.*

Argument

1. Grant's alienation of affections claim is supported by the evidence and is not appropriate for summary judgment.

A successful claim for alienation of affections requires the showing of three elements. Those are:

1. Wrongful conduct by the defendant with the specific intent to alienate one spouse's affections from the other spouse (such intent may develop at any point during the adulterous relationship);
2. Loss of affection or consortium; and
3. A causal connection between such intentional conduct and the loss of affection.

State Farm Fire & Cas. Co. v. Harbert, 2007 SD 107, ¶ 24, 741 N.W.2d 228, 236.

"*The gravamen of an action for alienation of affections is enticement.*" *Pankratz v. Miller*, 401 N.W.2d 543, 549 (S.D. 1987) (emphasis in original). As explained by the *Pankratz* court, Brittney's diminution of affection from Grant may not be because of Jon's "kindliness, attractiveness, desirability, financial superiority," or other similar reason.

Pankratz v. Miller, 401 N.W.2d 543, 549 (S.D. 1987). Instead, Jon's conduct must have enticed Brittney into the affair which caused her affections toward Grant to diminish. Taking all inferences in favor of Grant, and against Jon, the elements required for an alienation of affections claim are satisfied.

A. Jon's conduct was wrongful and intended to alienate Brittney's affections.

In his brief in support of the motion for summary judgment Jon does not even attempt to argue that his conduct was not wrongful. Jon admitted that he knew having the affair with his subordinate was wrong, *Gaiser Depo* 34:15-34:19, and he was fired from MetaBank because of the relationship. *Gaiser Depo* 64:02-60:14. Whether moral, professional, or legal — Jon's actions were wrongful by any standard.

It is equally clear that Jon intended to win the affections of Brittney from the very beginning. In his argument that he did not act intentionally, Jon confuses the requirement of the alienation of affections claim. That neither Jon nor Brittney planned to leave their spouses is not the test by which intentional conduct is measured. Divorce is not an element of the alienation of affections claim. Instead it is enough that Jon intended to gain Brittney's affections to Grant's loss.

Intent, for alienation of affections purposes, is rarely supported by direct evidence, since "the defendant rarely admits the crucial element of intentional wrongful conduct[.]" *Kebede v. Hilton*, 580 F.3d 714, 717 (8th Cir. 2009) (*quoting Veeder v. Kennedy*, 1999 SD 23, 589 N.W.2d 610 at 620.). Instead, intent is established, especially for summary judgment purposes, through circumstantial evidence and presumptions. *Id.*

"'[A]ctual intent to alienate the affection of the spouse of another need not necessarily be shown if defendant's conduct is inherently wrong and tends to, and does, have that effect. In other words every person is presumed to intend the consequences of his own voluntary acts.'" *Kebede v. Hilton*, 580 F.3d 714, 716 (8th Cir. 2009) (*quoting Jones v. Swanson*, 341 F.3d 723 (8th Cir. 2003)).

In this case it is clear that Jon's conduct was inherently wrong. Not only did Jon know that Brittney was married, but he was in a unique position of dominance as her direct supervisor. Immediately after Jon hired Brittney he began writing pornographic stories in which he graphically fulfills his fantasies with Brittney. *See Affidavit of Clint Sargent*, Doc 23, Ex. 1. Additionally, Jon admitted that he knew what he was doing was wrong while he was doing it. *Gaiser Depo* 34:15-34:25. The inherently wrong element of the presumption of intent is satisfied.

Furthermore, it is almost obvious that Jon's actions tended to, and did, have the effect of alienation Brittney's affections towards Grant. *Kebede v. Hilton*, 580 F.3d 714, 716 (8th Cir. 2009). That affection existed between Brittney and Grant will be discussed shortly, but for the purposes of the presumption of intent, the question is more general. Does having an affair with someone whom you spend 70-80 hours a week with, and with whom you share your sexual fantasies, and with whom you fulfill those sexual fantasies; do those voluntary acts tend to have the effect of causing one to become less affectionate toward their spouse? Of course the answer is yes.

Because Jon's actions were voluntary and they tended to, and did, have the affect of alienating Brittney's affections, element one is presumed to be satisfied.

B. There was a loss of affection between Brittney and Grant

Though Jon now argues otherwise, there was affection from Brittney towards Grant, and he knew it. Brittney testified, in recounting an email, that she told Jon that Grant was the most important person in her life.

> **Q**. [reading from an email] You write, "I'm having a good moment right now where things just click between Grant and I and I think, hey, I haven't lost the most important person in my life. Just someone I cared very deeply for. It could be worse."
> In that statement, Grant is the most important person in your life, isn't that right?
>
> **A. Yes.**
>
> **Q.** And you're actually finding some solace in the fact that you hadn't lost him at that point?
>
> **A. Right.**
>
> **Q.** You loved Grant even at that point, didn't you?
>
> **A. Yes. I did.**
>
> **Q.** You wanted to stay with him?
>
> **A. Yes, I did.**

Brittney Houwman Depo. 133:13-134:03. Of course the Houwmans' marriage had issues, like all marriages do. But Jon tries to exaggerate these usual struggles into an argument that there was no affection at all to be alienated. The evidence clearly shows that this was not the case, and that there were in fact affections from Brittney towards Grant even during the affair.

C. Jon's affair with Brittney caused her to lose affection for Grant.

It has been judicially determined that the affair was the cause of the Houwmans' divorce. *See Affidavit of Clint Sargent (second), Ex 1.* In explaining his decision to award the Houwmans' divorce to Grant, Judge Kean wrote:

> The court reaffirms its decision to award the divorce to Grant. This does not mean that Grant was free of shortcomings, but his defects were not the major cause of the breakup. Maybe over time these two litigants would have filed for divorce and the problems in the marriage and the foibles of each would have balanced out so that a mutual divorce would have been granted. But that is not the factual situation before the court. Brittney carried on a torrid affair with her supervisor for a period of months and hid this from her husband and counselor [Dr. Eleeson]. If the court's use of the word "torrid" is seen as too vivid or not representative of the episode, the court would suggest that the emails between Brittney and Jon Gaiser, her supervisor, be reviewed.

Divorce Decree, pg 3.

Jon relies almost entirely upon the opinion of Dr. Susan Eleeson in arguing that Jon was free from blame for Brittney's loss of affections towards Grant. However, as has been submitted to this Court in Plaintiff's Motion to Exclude Expert Testimony, Dr. Eleeson's opinions are unreliable. Judge Kean noted that "From the testimony it is clear that Brittney was not totally forthcoming to Eleeson during the counseling and that the affair with her supervisor only came to light months later well after the counseling sessions had begun." *Id.* 2. Judge Keen continued by stating that he "expressed some concern over the far ranging opinions given by Eleeson, not only about the marriage, but also in other areas…" and that "Eleeson did not appear to have a full grasp of where Brittney was going in the marriage, as she testified she did not see the divorce coming and Brittney's filing for divorce caught her off guard." *Id.* 3.

Outside of the scrutiny of divorce litigation, or the pressures of trying to conceal the affair from her husband and counselor, Brittney recently testified that prior to the affair she did not suffer from anxiety or depreesion, was not on medications, did not need counseling, and considered herself emotionally stable. *Brittney Houwman Depo*. 123:22-124:07. However, immediately after the relationship with Jon turned sexual, Brittney was no longer emotionally stable.

> **Q.** On April 3rd, 2007, would you have considered yourself emotionally stable?
>
> **A.** No.
>
> **Q.** Was Mr. Gaiser the cause of your emotional instability?
>
> **A.** Yes.
>
> **…**
>
> **Q.** In your opinion, did he take advantage of that emotional instability?
>
> **A.** Yes. He was my boss, and he knew that I didn't want to make him mad.
>
> **Q.** You didn't go out looking for an alternative partner than Grant, did you?
>
> **A.** No.
>
> **Q.** You weren't looking to find someone other than Grant?
>
> **A.** No.

Brittney Houwman Depo. 124:08-124:25.

Britney described how the affair caused her to be distant from Grant and her children and affected her relationship with Grant.

> **Q.** Would it be fair to say that from April of 2007 until you told Grant about this affair, that because of your emotional state you weren't there for him like you had been prior to April of 2007?
>
> **A.** Definitely.
>
> **Q.** Same for your children?
>
> **A.** Yes.
>
> **Q.** Affected your communication with Grant and the time you spent together?
>
> **A.** Yeah.

> **Q.** Affected your sexual relationship with Grant?
>
> **A.** Yes.

Brittney Houwman Depo. 126:24-127:10.

It is well settled in the law that cause is ordinarily a question of fact reserved for trial. In this case, cause is clearly disputed and that dispute precludes the entry of summary judgment on the alienation of affections claim.

When the Court views the facts in the light most favorable to Grant, and resolves all doubts and inferences in favor of the existence of a cause of action for alienation of affection, it is clear that the defendant has not met his burden. Summary judgment is inappropriate on the alienation of affections claim.

2. Divorce costs are recoverable as direct and proximate losses occasioned by Jon's wrongful actions.

Alienation of affections is, at its base, a tort – and the general measure of damages for torts are recoverable. Section 21-3-1 provides that

> For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

SDCL § 21-3-1. It is undisputed that the laws of South Dakota do not provide for some other measure of damages for alienation of affections.

Put simply, Grant is entitled to damages which will compensate him for *all detriment* proximately caused by Jon's wrongful act. As stated above, it has already been found by Judge Kean that the affair was the cause of the Houwmans' divorce. So, Grant's pursuit of those damages which were caused by Jon's actions are recoverable.

Alienation of affections tortfeasors should not be granted refuge from fully compensating their victims solely because the fees went to a divorce lawyer instead of a chiropractor. Likewise, that the damages went to Brittney is not relevant in determining the amount of detriment caused by Jon. Though the damages incurred are not required to be foreseeable, in this case they were. It was foreseeable that Jon's seduction of Brittney would lead to a divorce. As a proximate result of Jon's actions Grant suffered a substantial monetary loss. The divorce law statutes cited by Jon have no bearing in calculating tort damages. The law requires that Grant be made whole.

3. Grant's deceit claim is supported by the evidence.

Grant's claim of deceit is supported by the evidence and is not appropriate for summary judgment. Grant's claim of deceit is pursued under either SDCL §§ 20-10-2(1) or (3). Those sections include deceits through:

> (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> …
>
> (3) The suppression of a fact by one who … gives information of other facts which are likely to mislead for want of communication of that fact.

SDCL § 20-10-2.

Jon suppressed the truth from Grant by giving misleading facts. It is undisputed that Jon, his wife Steph, and Grant and Britney spent time together while the affair was going on. It is a reasonable inference that Jon suppressed the fact that he was sleeping with Grant's wife by giving other information about Jon and Brittney's work relationship. Those "other facts," which did not include details about sending pornographic emails or confessing sexual fantasies, would have been likely to mislead Grant as to the nature of the relationship.

Likewise, Jon encouraged and intimidated Brittney to carry on the appearance of normalcy, knowing that their inappropriate relationship was anything but normal. Furthermore, Brittney testified that Jon threatened her not to tell the truth to Grant, even after Jon had told his own wife. *Brittney Houwman Depo*. 139:07-140:02. Grant testified that Jon threatened Brittney that Jon would ruin Grant's name and reputation if Brittney confessed the affair. *Grant Houwman Depo*. 111:12-112:15.

Whether Jon suggested to Grant, or suppressed from Grant, the relationship with Brittney is a question of fact for trial. Summary judgment is inappropriate on the claim for deceit.

4. Grant has met his burden in pursuing the claim for punitive damages.

Plaintiff relies generally upon the written material submitted to the Court in support of his Motion to pursue a punitive damages claim at trial. Based upon the evidence and argument supported in the previously submitted memorandum, Grant clearly meets the preliminary burden imposed under SDCL § 21-1-4.1.

Grant responds here to address Jon's claim that punitive damages for alienation of affections claims require something more than every other tort under South Dakota law. Jon would have this court adopt the substantive law of the state of Utah over the well settled law of South Dakota regarding punitive damages. The "malice plus" test adopted by Utah is not the law of South Dakota and is not applicable between these parties.

Jon's argument is, essentially, that any cause of action which requires malice as an element, requires extra malice to recover punitive damages. However, the South Dakota Supreme Court has very recently permitted punitive damages for a tort which required malice, without adopting any enhanced test as the defendant here suggests. *See e.g. Brown v. Hanson*, 2011 SD 21, — N.W.2d —, 2011 WL 1891478 (S.D. May 18, 2011) (Punitive damages awarded on slander of title claim, requiring malice.); *Leisinger v. Jacobson*, 2002 SD 108, 651 N.W.2d 693 (Supreme Court modified, but did not strike, punitive damages award in malicious prosecution case, which requires malice as an element.).

This court need not tread new ground when the South Dakota Supreme Court has so recently chosen not to change the statutory test set forth in SDCL § 21-1-4.1.

Conclusion

It is very clear that this case, which involves so many disputed factual questions, is not ripe for summary judgment. Disputed material facts exist concerning both the cause of action for alienation of affections as well as that for deceit.

The Plaintiff respectfully request this Court enter its order denying Jon's motion for summary judgment in full, and allowing Grant to commence discovery and proceed at trial on his punitive damages claim.

Dated this 6th day of June, 2011.

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Certificate of Compliance

I hereby certify that the foregoing MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT contains a total of 2,782 words and is in compliance with the word count limitation of D.S.D. Civ. L.R. 7.1 (B)(1). I have relied on the word count of a word-processing program to prepare this certificate. Furthermore, the document conforms to the formatting requirements of D.S.D. Civ. L.R. 83.5.

On this 6th day of June, 2011.

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Certificate of Service

I hereby certify that true and correct copies of the foregoing MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was filed electronically using the CM/ECF system, and thereby served electronically upon:

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